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Supreme Court, U.S.
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No. 87-273

In The

Supreme Court of the United States

October Term, 1987

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ST. JOHN STEVEDORING CO., INC.

and

INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

v.

JOHNETTA WILFRED,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals erred in affirming the Benefits Review Board's finding that:

A. There was "uncontradicted testimony" of acknowledgment of the minor illegitimate child, Johnetta Rene Wilfred, by John Henry Jones.

B. The "uncontradicted testimony" of all witnesses establishes the child's mother relied on regular contributions of substantial funds of money, even though the Administrative Law Judge failed to make such a factual inquiry.

C. A fact or determination of whether an illegitimate child is "acknowledged" should be made based on its plain common meaning and relevant federal case law.

D. The child's cause of action should not be offset or prejudiced because of a settlement between other parties. Johnetta Rene Wilfred has not received death benefits under the LHWCA.

E. The child's cause of action has not summarily been prejudiced due to the scope of a settlement which the child was not a party.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

1. JOHNETTA RENE WILFRED
2. ALENE C. JONES
3. ST. JOHN STEVEDORING CO., INC.
4. INSURANCE COMPANY OF NORTH AMERICA
5. SOLICITOR OF LABOR
   UNITED STATES DEPARTMENT OF LABOR
6. DIRECTOR
   OFFICE OF WORKER'S COMPENSATION
   UNITED STATES DEPARTMENT OF LABOR

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Petitioners,
v.
JOHNETTA WILFRED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent prays that the writ of certiorari be denied and that the Judgment of the United States Court of Ap-

peals for the Fifth Circuit, entered in this case on June 3, 1987, rehearing en banc denied on July 1, 1987, in a claim for death benefits under the Longshore and Harbor Worker's Compensation Act be affirmed.

———o———

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 818 F.2d 397 (5th Cir. 1987). The opinion of the Benefits Review Board is reported at 18 B.R.B.S. 68 (1986). The opinion of the Administrative Law Judge is reported at 17 B.R.B.S. 109 (ALJ) (1985).

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JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 3, 1987. A timely petition for rehearing en banc was denied on July 1, 1987. This petition for certiorari is filed timely and the respondent's brief in opposition is filed timely. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

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STATEMENT OF THE CASE

A. Statement of Prior Proceedings

On or about May 27, 1979, longshoreman John Henry Jones was working for St. John Stevedoring Co., Inc.,

when he sustained severe physical injury resulting in him being a quadriplegic. He began receiving benefits under the Longshore and Harbor Worker's Act. Thereafter, he filed a third-party action for personal injury in Texas State Court. This suit was settled and judgment entered for over one million dollars. This suit was settled and a third-party settlement was executed on December 21, 1981 by John Henry Jones, his mother, Alene Jones, and representatives of St. John Stevedoring Co., Inc. and the Insurance Company of North America.

John Henry Jones executed his "Last Will and Testament" dated March 17, 1982. In his Will he referred to respondent herein as "Johnetta Rene Jones". John Henry Jones died on June 8, 1982. There is ample evidence in the record to establish that John Henry Jones had a long term, intimate relationship beginning in 1978 with Sheryl Ann Wilfred. A child was born to Sheryl Ann Wilfred on October 4, 1979, and was named Johnetta Rene Wilfred. This child is the illegitimate daughter of John Henry Jones. She filed for death benefits under the Act and an informal hearing was held in Galveston, Texas on December 14, 1982. A formal hearing was held in Houston, Texas in November, 1983 before Administrative Law Judge Ben Wally. He rendered an erroneous Decision and Order in December, 1984 holding that based on the provisions of the Louisiana Civil Code, a preponderance of the evidence failed to establish the child's paternity and therefore awarded all benefits to the deceased's mother. The Administrative Law Judge remained silent on the issue of "dependency".

The child appealed to the Benefits Review Board which convened in Houston, Texas for an oral argument in

September 1985. The Board issued its Decision and Order in January 1986 reversing the Administrative Law Judge and holding that the child was "acknowledged" and "dependent" under the Act, that federal case law should apply, not Louisiana law, and she should receive benefits. The Employer/Carrier petitioned for review of the Board's Decision on March 10, 1986. The Fifth Circuit Court of Appeals affirmed the Decision of the Benefits Review Board and awarded death benefits to the minor child.

B. Statement of the Facts

I. In order to establish entitlement under the Act, an illegitimate child must be both "acknowledged" and "dependent" upon the deceased. 33 U.S.C. Section 902(14).

II. The Child "Acknowledged"

The child is acknowledged by John Henry Jones in many ways. The Will of John Henry Jones makes specific reference to "Johnetta Jones". This is a sworn document, properly executed, witnessed, with notary and formally declared. The obituary notice or funeral service sheet entitled "In Loving Memory of John Henry Jones" dated June 12, 1982, Mount Rose Missionary Baptist Church, Brenham, Texas mentioned that he is survived by "one daughter, Johnetta". The *Galveston Daily News,* dated June 10, 1982 "Obituary Notice" stated, "He is survived by a daughter, Johnetta Rhenae Wilfred of New Iberia, Louisiana".

The sister of John Henry Jones testified at the hearing before the Administrative Law Judge that she, Frances Ray, supplied the information for the "obituary notice" in the newspaper and the "service sheet" used at the

funeral, referring to the minor child, Johnetta. She stated in her deposition of January 20, 1983, that she "handled affairs after his injury and after his death."

A video deposition, sworn before a certified court reporter and notary public dated June 30, 1981, was given by John Henry Jones in his lawsuit hereinabove mentioned. John Henry Jones publicly acknowledged the illegitimate child, Johnetta Rene, as his child.

Letters and postcards sbumitted at the informal hearing and made part of the record herein prove a long term, intimate relationship before John Henry Jones' injury, after his injury and before his death. In fact, the letter dated March 2, 1979 refers to money being sent to Sheryl Ann Wilfred and John Henry Jones closes the letter with the following:

> "Signed you love,
> John H. Jones
> To Miss Sheryl Ann Wilfred
> (Jones to be)"

The record before the Administrative Law Judge concludes that the child is acknowledged. Testimony from the mother, Sheryl Ann Wilfred, the grandmother, and Florita Jacquet testified that the child was recognized in the community as the child of John Henry Jones and that John Henry Jones knew that this was his child. Alene Jones, mother of the deceased, said in her deposition that "he treated the child as his".

Affidavits of Patricia Dugas, Elsie Murray, and Florita Jacquet filed of record at the informal hearing in Galveston, Texas, all state that they had personal knowl-

edge of the relationship between Sheryl Ann Wilfred and John Henry Jones.

The Board of Review concluded and the Fifth Circuit Court of Appeals agreed and we submit same, that there is nothing in the record to suggest that claimant is not John Henry Jones' daughter. Since the evidence is clear, uncontradicted, and allows no other possible result, the child should be declared acknowledged by this Court.

III. The Child "Dependent"

With regard to the question of dependency, Sheryl Ann Wilfred testified that she depended on her mother for support and that decedent would give money on a regular basis. Similar testimony was given by decedent's sister, Frances Ray, and the witness, Florita Jacquet.

In the video deposition of John Henry Jones, he said:

> "She don't call herself Jones because—I may have some papers fixed up for her to be my daughter that says she's my daughter. I'm going to let her wear my name and get everything fixed up for her so she can be a Jones so I can take care of her properly."

He himself admits acknowledgment and his intention to support.

The affidavits submitted at the informal hearing of Sheryl Ann Wilfred, Elsie Murray, Patricia Dugas, Flority Jacquet and Terry Menard, further substantiate that Sheryl Ann Wilfred, mother of Johnetta, relied on regular contributions of substantial sums of money. In fact, the grocery store owner, Terry Menard, states Florita Jacquet, mother of Sheryl Ann Wilfred, and grandmother of Johnetta, cashed the money orders at his store. The Admin-

istrative Law Judge reached that conclusion, even though he did not decide the issue of dependency.

Petitioner erroneously argues that the issue of dependency is to be considered dependency of mother at the time of injury. In fact, the issue is dependency of the child. The evidence is uncontradicted that there was economic support of the mother by John Henry Jones before the child was born, but more importantly, substantial support after the child was conceived and born. Petitioner admits in his brief that "various witnesses testified as to post-injury financial contributions made by John Henry Jones and the child".

The deposition of the sister of John Henry Jones, Frances Ray, clearly proves the long-standing relationship and dependency. She testified she brought Sheryl Ann Wilfred to Galveston to visit John Henry Jones in December, 1978. That Sheryl went to the hospital to see John Henry Jones after the injury. Ms. Ray states "she assumed John to be the father of the child". She states she would send money every two weeks and would send it by money order and this went on for "2½ years". She sent gifts at Christmas.

The deposition of the mother of John Henry Jones, Alene Jones, further confirms "acknowledgment" and "dependency". She states that her son went to Louisiana and met Sheryl Ann Wilfred. He brought her up for Christmas one year. She first learned of Sheryl's pregnancy when Sheryl came to see John in the hospital after the accident. Sheryl told Ms. Jones, after the hospital visit, at the apartment. They bought things for the baby. They started sending money and gifts on a regular basis when

his compensation started and this was "about $45 every 2 weeks, sometimes as high as $80". This went on until John Henry Jones' lawsuit was settled and this money was sent by money order. The mother clearly states that Sheryl Ann Wilfred "brought the child to see him and he treated it as his".

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REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I.

SUMMARY OF THE ARGUMENT

A. The Fifth Circuit was correct in concluding that there was "uncontradicted evidence" of acknowledgment of the minor illegitimate child, Johnetta Rene, by John Henry Jones.

In order to establish entitlement under the Act, an illegitimate child must be both acknowledged and dependent upon the deceased. See 902(14) of the Longshore and Harbor Worker's Act states:

> "Child shall include a posthumous child, a child legally adopted proof to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one (1) year prior to the time of the injury, and a stepchild or *acknowledged illegitimate child dependent upon the deceased . . .*" 33 U.S.C. 902(14).

In *Weyerhauser Timber Co. v. Marshall*, 102 F.2d 78 (9th Cir., 1939), the Court expressly rejected the use of state law in the determination of who is an "acknowledged illegitimate child dependent". The Court stated:

> "Congress having provided all definitions necessary to the determination of whether claimant is a 'child' and its authority being paramount and exclusive as to the subjects on which it has legislated, it is not allowable to go beyond the Act provisions." 102 F.2d at 81.

This case stands for the principle that an orally acknowledged illegitimate is a "child" within the meaning of the Act and is entitled to benefits. There was an oral acknowledgment of the child by John Henry Jones in his video deposition. The fact that the decedent's sister, Frances Ray, recognized that there was a relationship between the mother, Sheryl, and John Henry Jones, and a relationship between John Henry Jones and the child. The affidavits of Florita Jacquet, Elsie Murray and Patricia Dugas recognizes acknowledgment of Sheryl Ann Wilfred.

The cases of *Ryan-Walsh Stevedoring Co., Inc. v. Trainer,* 601 F.2d 1306, 10 B.R.B.S. 852 (5th Cir., 1979), and *Ellis v. Henderson,* 204 F.2d 173 (5th Cir.), cert. denied, 346 U.S. 873 (1953), cited by the Administrative Law Judge in support of the use of state law are readily distinguished from the present case. In *Ryan-Walsh Stevedoring Co., Inc.,* supra, state law was properly used to define the term "widow" as including only the "decedent's wife", an operative status undefined by the Act; hence, to be solved by the application of state law. See *Weyerhauser,* 102 F.2d at 81. Likewise, *Ellis,* supra, is also distinguishable in that it is concerned with the definition of "child" in 902(14) insofar as a legal presumption created that status due to the deceased employee's failure to bring an action to disavow paternity. In fact, the Fifth Circuit in *Ellis,* distinguished and cited with apparent approval *Weyerhauser Timber Co.*

The controlling case stated to acknowledge is "to own or admit as implying or incurring responsibility", citing Funk & Wagnall's New Standard Dictionary (1937 Ed.). Therefore, to acknowledge under the provisions of the LHWCA does not require a written act of acknowledgment. A longshoreman's orally acknowledged illegitimate is a "child" within the LHWCA and entitled to compensation. *Weyerhauser Timber Co.* A fortiori, an oral acknowledgment of an illegitimate child in a video deposition by an individual, duly sworn in the presence of a Notary Public and witnesses, certainly complies with the provisions of the LHWCA. See Video deposition of John Henry Jones, pages 21-24, in evidence.

Another Fifth Circuit case, *Texas Employer's Insurance Association v. Shea,* 410 F.2d 56 (5th Cir. 1969), lends further support for two (2) statements of law extracted from the cases above. First, the Court held that a posthumous illegitimate child falls within the statutory definition of a "child" in 902(14) without referring to state law, but rather relied on congressional intent. In reference to the definition of "child" in the LHWCA, the Court stated:

> "Moreover, this definition, in accord with the policy of the Act as a whole, must be liberally construed in favor of coverage and in a way which avoids harsh and incongruous results . . . dependence, not the legality of the father's nuptials, is the keynote of coverage . . ." 410 F.2d at 59.

Secondly, the Court not only negated the need for written or "another other ritualistic proclamation" of acknowledgment in that the child was en ventre sa mere. There mere cohabitation by deceased with the mother of the un-

born child, with knowledge of her pregnancy was a sufficient inference of acknowledgment, *Texas Employer's Insurance Association,* supra.

The petitioner continues to make erroneous reference to "paternity" and not "acknowledgment". In order to attempt to arrive at a conclusion that there is insufficient evidence to prove paternity he tries to rely on Louisiana state law. The Administrative Law Judge was looking for the wrong test when he was seeking proof of paternity. The case of most recent date on this issue is *Lashawn Bonds (Daughter of deceased, Johnny James Bonds) vs. Smith and Kelly Company and American Mutual Liability Insurance Company,* BRB 81-2519, August 13, 1985. The primary issue on appeal to the Benefits Review Board was whether Stephanie and Yvonne Anderson, the acknowledged illegitimate children of the deceased employee, Johnny James Bonds, were dependent upon the deceased pursuant to Section 2(14) of the Act 33 U.S.C., Section 902(14). The deceased employee's legitimate child contends that the Administrative Law Judge erred in applying Georgia law rather than Federal law and that Stephanie and Yvonne were dependent upon the decedent. The Administrative Law Judge found that both Stephanie and Yvonne were acknowledged illegitimate children. The Benefits Review Board affirmed this finding and the only issue remaining was whether or not they met the dependency requirements. The Administrative Law Judge relied on the definition of dependency used in Georgia's Domestic Relations Law because the term "dependent" is not defined in the Act. Petitioners contended that the dependency under the Act should be evaluated according to Federal Law which required a factual analysis of financial support and other

relevant factors. The Benefits Review Board in this case agreed. It stated:

> "Although it is sometimes appropriate to resort to local law for the definition of terms not defined in the Act, this approach is appropriate only when the term does not have a clear, common meaning and reasonable doubt exists as to the proper meaning of the term." *Marcus v. Director,* O.W.C. 548 Fed.2d 1044, 1047 N.4 (D.C. Cir., 1976); *Ryan Walsh Stevedoring v. Trainer,* 601 Fed.2d 1306 (5th Cir., 1979).

This decision certainly is "on all fours" with our argument before this Court.

In the alternative, and in event that this Honorable Court feels compelled to apply state law, the proper local forum is not that of Louisiana, but rather Texas. Realistically, there exists no conflicts of law between Louisiana and Texas as to this issue. It is obvious that each state has an interest in the acknowledgment of its illegitimate children and an equally important, but potentially conflicting interest in protecting the alleged father and his collateral relations. It is the latter of these concerns which mandates more conditions and formalities be observed before the state will pronounce that a child has been legitimated. If the state which is charged with the protection of the family, Texas in this case, is willing to hold the child legitimated, there exists no conflict between the two states. *Blythe v. Ayres,* 96 Cal. 532, 31 Pac. 915 (1982), referred to as perhaps the most important single case dealing with conflict of laws and illegitimate children, "promulgated the now black-letter rule that the legitimation depends upon the law of the father's domicile at the time of the alleged acts of legiti-

mation." *Ester, Illegitimate Children,* 36 Ind. L.J., 163, 180 (1961).

Under Texas law, legitimization proceedings can be either voluntary or involuntary, Tex. Fam. Code Ann. 13.01 et seq. (1980); both of which require formalities which are not present in the case at hand. However, this lack of formalities should not be dispositive as to the issue of acknowledgment. The Probate Code in 3(b) provides another means for an illegitimate child to inherit from the statutory legitimization proceedings, states as follows:

> "Child includes an adopted child, whether adopted by an existing or former statutory procedure or by acts of estoppel, but unless expressly so stated herein, does not include an *unrecognized, illegitimate child of the father".* (Italics added) Texas Prob. Code Ann. 3(b) (1980).

The interpretation of the above Italics language was at issue in *Johnson v. Mariscal,* 620 S.W. 2d 737, Cert. denied 102 S.Ct. 3496. The Texas Court in interpreting its own code stated:

> "By expressly excluding an unrecognized illegitimate child of the father, the statute impliedly provides that a *'recognized illegitimate child of the father is included in the definition of a child.'* Therefore, if a father does in fact 'recognize' his illegitimate child, then the child is entitled to inherit. By virtue of this statute, the recognized illegitimate child of the father may inherit from that father without other statutory legitimization". 620 S.W. 2d at 908

3(b) of the Probate Code should be considered in determining whether an illegitimate child has been acknowledged for purposes of 902(14) of the LHWCA. The averment is

not without support. First, Congress is enacting 42 U.S.C.A. 416(2)(A), relating to Social Security Benefits, has recognized the importance of Probate Law as it concerns the status of family relationships; to wit, in determining whether an applicant is the child or the parent of the insured, the Secretary shall apply such appropriate state law as would be applied in determining the devolution of interstate personal property. Secondly, the word "recognized", as used in *Johnson*, supra, is more analogous to 902 (14) use of "acknowledged" than is "legitimization proceedings" in the Texas Family Code. Lastly, in its own right as further support of the above, the definitions of "child" in 902 (14) has been referred to as very broad and should be liberally constructed in favor of coverage in accord with the policy of the LHWCA, *Texas Employers Insurance Association*, supra.

B. The Fifth Circuit Court of Appeal was correct in concluding that the child's mother relied on "regular contributions of substantial money" from John Henry Jones to the mother, Sheryl Ann Wilfred and the child, Johnetta Rene Wilfred.

The Administrative Law Judge did not make any findings as to dependency. He was silent but the Board of Review did and they found there was dependency. Pregnancy, by its nature, is a state wherein the unborn child is a "dependent" upon its mother. The child is incapable of independent dependency. The petitioner equates "dependency" with economic support". This would preclude an unborn child from ever receiving benefits. See *Sheppeard Standard Dredging Corporation v. Henderson*, 150 F.2d 78 (5th Cir., 1945).

A child en ventre sa mere is dependent on a LHWCA-Covered Worker, if at the time of the accident, the child's mother was dependent on that worker. *Texas Employer's Insurance Association v. Shea.* In determining the dependency of a mother and child, the LHWCA does not require that the mother be supported entirely by the covered worker, partial dependency is sufficient. *Texas Employer's Insurance Association v. Sheppeard,* 62 F.2d 122 (5th Cir., 1932). Dependency may result if the injured party was "maintaining or helping to maintain the dependent is his customary standard of living." *United States Fidelity and Guaranty Company v. Britton,* 188 F.2d 674 (D.C. Cir., 1951)

Sheryl Wilfred carried Johnetta to term and she re-received regular financial aid from John Henry Jones. The uncontradicted testimony reflects that from the time Johnetta was in utero, and continued to the date of his death, John Henry Jones sent Sheryl Wilfred hundreds of dollars for their support, in regular payments. In addition, he bought the child clothing and gifts. Applying the test in *Sheppeard Standard Dredging Corporation v. Henderson,* 150 F.2d 78 (5th Cir., 1945) Johnetta Rene Wilfred is an eligible child entitled to death benefits under the act.

C. The Fifth Circuit Court of Appeals was correct in concluding that a factual determination of whether an illegitimate child is "acknowledged" should be made based on its plain common meaning and relevant federal case law.

Article 203 of the Louisiana Civil Code provides one method of establishing filiation of an illegitimate child:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and

> mother or either of them, or it may be made in the registering of the birth or baptism of the such child.

It was concluded by the Benefit's Review Board and the Fifth Circuit Court of Appeal agreed and respondent concurs that the decedent's deposition testimony was taken by a certified shorthand reporter and notary public before four witnesses is a declaration publicly acknowledging the illegitimate child in the instant case for purposes of Article 203.

D. The Fifth Circuit Court of Appeals was correct in finding that the child's cause of action should not be offset or prejudiced because of a settlement between other parties.

The fact is that Johnetta Rene Wilfred has not received any benefits under this Act. Petitioners argue that decedent settled for his "heirs, executors, administrators, assigns, next of kin, other legal representatives" and therefore the claim on behalf of the minor child, Johnetta, is barred. The fact is that John Henry Jones did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter. The Act clearly contemplates that the rights of minors and those found mentally incompetent ought to be protected. Section 911 envisions the appointment "by a Court of competent jurisdiction" of a guardian for a minor, one who would then be empowered to act on behalf of the minor. The law of Louisiana, Johnetta's domicile, would control. If not, the law of decedent's domicile, Texas would. Under the laws of either state, "approval is required to compromise and settle a minor's claim". Louisiana Code of Civil Procedure Article 4265 and Rule 44, Texas rules a civil procedure. This was not done in this case. Therefore, the

rights of the minor should be unaffected by the settlement agreement signed by the father.

E. The Fifth Circuit Court of Appeal was correct in that the minor child's cause of action has not been prejudiced due to the scope of a settlement which the child was not a party.

In the alternative, counsel for petitioners, St. John Stevedoring and Insurance Company of North America, knew of the existence of the minor child at the time of the video deposition. They knew, or should have known that this child may have had an interest in this settlement, but yet, did not seek the child or protect the rights of St. John Stevedoring or Insurance Company of North America or the minor child. Why should the minor child's right be denied for this omission?

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CONCLUSION

The evidence clearly proves that the minor child, Johnetta Rene Wilfred, is the illegitimate, acknowledged child of the decesaed, John Henry Jones. The evidence proves that he sent the mother, Sheryl Ann Wilfred, before the birth of the child and after, substantial sums of money and that the mother and the child were dependent on same. The Court must uphold the Board of Review and the Fifth Circuit Court of Appeals and order the payment of death benefits to this little girl as soon as possible.

RESPECTFULLY SUBMITTED:

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